IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 72.

Appeal From the Court of Claims.

REPLY BRIEF.

I

A cadet at the Military Academy is not an enlisted man.

1. Sec. 1094, Rev. Stat., enacts that the Army of the United States shall consist of certain named officers, regiments of artillery, cavalry, and infantry of specified numbers, certain departments, a corps of engineers, a battalion of engineer soldiers, enlisted men of the ordnance department, hospital stewards, a bureau of military justice, chaplains, a force of Indian scouts, officers on the retired list, one band stationed at the military academy, "and the professors and corps of cadets of the United States Military Academy."

That section establishes and divides the army. There is nothing in it to indicate the legislative purpose that a cadet in the military academy should be an enlisted man in any sense, or even perform the duties of an enlisted man. We know that enlisted men, not of the corps of cadets, are at the military academy and they are given extra pay for services rendered by them. For illustration see 31 Stat. 647.

2. We do not see how any one can read sections 1309 to 1341, inclusive, Rev. Stat., and then claim that a cadet at a military academy is an enlisted man. Those sections relate to and establish a military academy where the young men of the corps of cadets are instructed, to the end that they may intelligently and faithfully perform their duties as officers in the army of the United States. Those sections are utterly repugnant to the view that a cadet at that academy is an enlisted man.

II

Counsel for the United States, pp. 25 and 26, argues that the status of cadets at the naval academy is different from the status of cadets at the military academy, and contends that the *Perkins case*, 116 U. S. 483, is not applicable in principal to the case at bar, for the alleged reason that the articles of war for the Navy, in article 36, re-enacted section 1229, Rev. Stat. In that section there is this language: "And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court martial to that effect, or in commutation thereof." Art. 36 of the articles for the government of the navy, Rev. Stat., p. 282, is as follows: "No officer shall be dismissed from the

naval service except by order of the President or by sentence of a court martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court martial or in mitigation thereof."

The concluding sentence of sec. 1229, and the final clause of Art. 36, are the same in substance and effect, though the language differs slightly. We submit that the judicial interpretation of the two statutes must be the same, and that the naval cases cited in our original brief are equally applicable, in like circumstances, to cases of officers in the army.

III.

Counsel for the United States, pp. 27–29, insists that the president had the power to remove the appellant, unrestricted by sec. 1229, and that the removal of the claimant by the President, when ratified and confirmed by the Senate, bars this action.

The 3d and 4th findings of fact, Rec. 8–9 state that the claimant was dismissed July 27, 1883; and that, June 15, 1884, George W. Kirkman was appointed to succeed the claimant; that he was graduated from the Academy and appointed a second lieutenant in the army of the United States; his nomination to that office was confirmed by the Senate Dec. 20, 1889; and he was commissioned by the President Jan. 7, 1890. From the date of dismissal to the commissioning of Kirkman nearly six and one-half years elapsed. It was not until the confirmation of Kirkman that the Senate acted upon his appointment to the army.

Counsel for the Government relies on *Blake* vs. *U. S.*, 103 U. S. 227. That case holds that the President has the power to supercede or remove an officer of the army or navy by the appointment, by and with the

advice and consent of the Senate, of his successor. In the case at bar, the appointment of Kirkman was not brought to the attention of the Senate through his nomination until more than six years after the dismissal of the appellant, and even then the only question that the Senate could consider, in view of the facts of the case, was the propriety of confirming Kirkman. The Senate could not then go back to the dismissal of the appellant and decide whether or not he had been lawfully and properly dismissed, for, in the matter of the confirmation of Kirkman, the Senate was not to consider the displacement made more than six years before. If the appointment of Kirkman to the Military Academy had been subject to the confirmation of the Senate, and if the President had nominated Kirkman for cadetship to the Senate, and if the Senate had confirmed that appointment, it would have approved of the act of the President in dismissing the appellant here. But that is not this case. To bring the appellant under the doctrine of the *Blake*, *Mullan*, *Parsons* and *Shurtleff* cases cited on the brief filed for the Government, it would be necessary to show by fact and by law that the President nominated Kirkman *for the cadetship* to the Senate, that the Senate ratified his appointment, and thereby the President, with the approval of the Senate, dismissed this appellant.

We submit that this case is outside of the rule established by those cases—outside of it both in fact and in law.

IV.

Even if the Senate, in confirming the appointment of Kirkman as second lieutenant, ratified the act of

the President in dismissing the appellant, such ratification did not occur until nearly six years and a half after the dismissal, and until the date of that ratification the appellant must be held, as we think, to be an officer in the army of the United States, and entitled to pay.

W. W. DUDLEY,
L. T. MICHENER,
Attys. for Appellant.